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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-826

FAIRFAX HOSPITAL ASSOCIATION, *et al.*,
Petitioners,

v.

CITY OF FAIRFAX, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 24(5) of this Court's Rules, petitioners Industrial Development Authority of Fairfax County, Virginia ("IDA") Fairfax Hospital Association ("FHA") and Commonwealth Doctors Hospital, Inc. ("CDH') submit this Supplemental Brief for the purpose of calling to the Court's attention the application to this case of the Court's decision in *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, No. 76-864, decided March 29, 1978. Petitioners respectfully submit that the decision in *Lafayette* requires summary reversal of the split decision of the Court of Appeals below.

ARGUMENT

A. The District Court Properly Held that the *Parker* Exemption Was Applicable to the Municipal Action Challenged Here.

In *Lafayette*, this Court held that "[t]o the extent that the actions of a State's subdivisions are the actions of the State, the *Parker* exemption applies." (Slip Op. at 17 n. 33.) Part III of the plurality opinion explains that the acts of a municipality are deemed the acts of the State itself when the "State [has] *authorized* or directed a given municipality to act as it did . . . ." (Slip Op. at 24; emphasis supplied.) In adopting the analysis of the Fifth Circuit, the plurality made clear that such authorization or direction "exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" (Slip Op. at 25, *quoting* 532 F.2d at 434.) The plurality expressly disclaimed a restrictive reading of this standard, explaining that a municipality need not be able "to point to a specific, detailed legislative authorization" for each act. (Slip Op. at 25.) Indeed, the plurality explicitly rejected as "hyperbole" the dissent's assertion that this standard would "'impair the ability of a State to delegate governmental power broadly to its municipalities.'" (*Id.*)

As more extensively set forth in the Petition (at 3-9), in this case the "action complained of" is the *leasing* of Commonwealth Doctors Hospital ("Commonwealth") by the County-created IDA to the County-created FHA for operation by FHA as part of the County's areawide, multi-facility, non-profit public health care system. As recognized by both the Court of Appeals below (App. 8a) and the District Court (App. 33a-34a), the Fairfax County Board of Supervisors created IDA by ordinance and expressly directed it to acquire Commonwealth and

lease it to FHA. It is thus apparent that the "complained of" leasing "derive[s] its authority and its efficacy from the legislative command"[1] of the Fairfax County Board of Supervisors. Accordingly, under the analysis adopted in *Lafayette*, the precise question presented in this case is simply whether the Fairfax County Board of Supervisors was properly "authorized" by the Virginia legislature to create IDA and command it to lease Commonwealth to FHA. As the District Court below stated, "if the lease is an exercise of the state acting as sovereign it is immune from federal antitrust attack." (App. 34a.)

Petitioners submit that the District Court's affirmative resolution of this question is indisputably correct. As the governing body of Fairfax County, the Fairfax County Board of Supervisors has undoubted delegated powers to provide adequate and efficient hospital and health care facilities for the citizens of Fairfax County. As the District Court stated, "[t]he State of Virginia has long recognized that private enterprises may not provide adequate hospital and medical care to the public and has authorized cities and counties to form health and hospital authorities and commissions for the purpose of providing adequate public hospital and medical care" (App. 34a), *citing* the Hospital Authorities Law, Va. Code § 32-212 *et seq.* (Supp. 1977) (App. 67a) and the Hospital or Health Center Commissions Act, § 32-276 *et seq.* (Supp. 1977) (App. 57).

Pursuant to the express powers delegated to the County under the Hospital or Health Center Commissions Act, the County has established over the years a coordinated public health care system in Fairfax County, run by FHA. The District Court found that "[i]n 1947 the County of

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[1] *Parker* v. *Brown*, 317 U.S. 341, 350 (1943).

Fairfax, *pursuant to State mandate*,[2] established a Hospital and Health Care Commission" which in turn established defendant FHA in 1955 "to operate public health facilities within the County," including Fairfax Hospital which was completed in 1960.[3] (App. 34a; emphasis supplied.) The District Court further found that since the establishment of FHA, "the County Board of Supervisors has sought to create a county-wide system of public health services." (App. 34a.) Pursuant to this goal, in 1967 the voters of Fairfax County "approved a bond referendum providing funds for the development by the County of a multi-hospital system of health care facilities, all of which were to be operated by the FHA." (District Court Opinion, App. 27a-28a.) These funds have been used to construct Mount Vernon Hospital and the ACCESS ambulatory health care facility in Reston,

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[2] *See* Hospital or Health Center Commissions Act, Va. Code § 32-277 (1973), which provides that the governing body or bodies in each city, county and town:

> may adopt a resolution declaring that there is need for a hospital or health center commission in such political subdivision or subdivisions, if it or they shall find that the public health and welfare . . . in such subdivision or subdivisions and surrounding area *require the acquisition, construction or operation of public hospital facilities for the inhabitants thereof.* (App. 57a-58a; emphasis supplied.)

[3] *See* Hospital or Health Center Commissions Act, Va. Code § 32-280 (Supp. 1977), which provides in pertinent part:

> § 32-280. Powers of commission.—Any hospital or health center commission established hereunder shall have all powers necessary or convenient to carry out the general purposes of this chapter, including the following powers in addition to others herein granted:
>
> * * * *
>
> (11) *Leases and construction agreements.*—To enter into leases and agreements with persons, firms, corporations, associations or other groups which provide for the construction and/or operation of a hospital or health center by such persons, firms, corporations, associations or other groups on land of the commission. (App. 59a, 61a.)

Virginia, both of which are owned by the County and leased to FHA for operation on behalf of the County.

In addition to the powers delegated to "each city, county and town"[4] by the Hospital or Health Center Commissions Act, the Virginia legislature has, through the Industrial Development and Revenue Bond Act, Va. Code § 15.1-1373 *et seq.* (Supp. 1977) (App. 39a), sought to promote the health and welfare of the citizens of the Commonwealth by empowering counties and other municipalities to create industrial development authorities. As amended in April 1977,[5] Section 15.1-1375 of the Act sets forth the purposes of the Act and states in pertinent part:

> It is the . . . *intent of the legislature and shall be the policy of the Commonwealth* to grant to industrial development authorities the powers contained herein with respect to medical facilities . . . *to the end that such authorities may protect and promote the health and welfare of the inhabitants of the Commonwealth by assisting in the acquisition*, construction, equipping, expansion, enlargement and improvement of medical facilities . . . *in order to provide modern and efficient medical services to the inhabitants of the Commonwealth* . . . and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth and for the promotion of their health and welfare. *It is not intended hereby that any such authority shall itself be authorized to operate any such medical facility* . . . . (App. 43a; emphasis supplied.)

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[4] Hospital or Health Center Commissions Act, Va. Code § 32-276 (1973) (App. 57a).

[5] 1977 Va. Acts, Chapter 619.

To serve these purposes, Section 15.1-1376 of the Act authorizes the governing body of any municipality [6] to create by ordinance an industrial development authority which is deemed "*a political subdivision of the Commonwealth*, with such public and corporate powers as are set forth in this chapter." (Emphasis supplied.) Section 15.1-1376 further provides that "[a]ny such ordinance may limit the type and number of facilities which the authority may otherwise finance under this chapter . . . ." (App. 43a-44a.) Section 15.1-1378 of the Act expressly spells out the powers of an industrial development authority [7] as including the power "*to acquire* whether by purchase, exchange, gift, lease or otherwise . . . one or more authority facilities." (15.1-1378(d); emphasis supplied; App. 45a.) Industrial development authorities are also empowered "*to lease to others* any or all of its facilities . . . ." (15.1-1378(e); emphasis supplied; App. 45a.) The Act specifically defines such authority facilities as including "any or all medical (including, but not limited to, office and treatment facilities) . . . now existing or hereafter acquired . . . for lease or sale by the authority pursuant to the terms of this chapter." (15.1-1374(d); App. 39a.) These facilities may not be operated by the authority itself since the legislature of Virginia has provided that "[i]t is not intended hereby that any such authority shall itself be authorized to operate any such medical facility . . . ." (Va. Code 15.1-1375 (Supp. 1977); App. 43a.)

[6] "Municipality" is defined by Section 15.1-1374(b) of the Act as meaning "any *county* or incorporated city or town in the Commonwealth . . . ." (App. 39a; emphasis supplied.) The Fairfax County Board of Supervisors is the governing body of Fairfax County. Va. Code §§ 15.1-6(1), 15.1-7 (1973); *Board of Supervisors* v. *Alexandria Water Co.*, 204 Va. 434, 438, 132 S.E.2d 440, 442 (196?).

[7] As the District Court below noted (App. at 34a), Virginia law establishes that the powers of an industrial development authority are "legislative powers and their exercise is a legislative function." *IDA* v. *LaFrance Cleaners & Laundry Corp.*, 216 Va. 277, 282, 217 S.E.2d 879, 883 (1975).

The Industrial Development and Revenue Bond Act establishes beyond doubt that it is the "intent of the legislature" and the "policy of the Commonwealth" to delegate to the Fairfax County Board of Supervisors the power to create, as it did in this case, an industrial development authority for the purpose of "assisting in the acquisition . . . of medical facilities" where the Board of Supervisors determines that the authority would help "provide modern and efficient medical services to the inhabitants of the Commonwealth . . . ." Industrial Development and Revenue Bond Act, Va. Code § 15.1-1375 (Supp. 1977); App. 43a.) Indeed, the Virginia Supreme Court has held that, in creating an industrial development authority such as IDA, a municipality acts in a legislative capacity and as "the legislative arm of the state." *IDA* v. *Suthers*, 208 Va. 51, 55, 155 S.E.2d 326, 330 (1967). Given these express manifestations of legislative policy and given the long-standing, indisputably proper role played by the County and FHA in providing public health care facilities, it is clear that the District Court properly concluded that "[t]he lease by the IDA to the FHA . . . is part of a state mandated program providing for the public health, an act within the police power of the states and clearly an act of sovereignty shielded from antitrust attack." (App. 34a.) [8]

[8] In so holding, the District Court expressly relied on the reading given *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) by the Third Circuit in *Duke Co.* v. *Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975). The District Court thus held that the requisite legislative intent for a municipality to engage in anticompetitive activities "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." (App. 33a.) In *Lafayette*, the Fifth Circuit recognized that its analysis was "in accord with that of the Third Circuit in *Duke & Co.* v. *Foerster, supra*, 521 F.2d at 1279-80." (532 F.2d at 434 n.8.) It is thus clear that the

B. The Court of Appeals Applied A Legal Standard In Conflict with that Affirmed By This Court In *Lafayette.*

As noted in the Petition (at 15-18), in reversing the District Court, both Judge Wyzanski and Judge Widener rejected the legal standard employed by the Fifth Circuit in *Lafayette* and adopted by the District Court. Focusing first on FHA, Judge Wyzanski would require proof "that the Commonwealth of Virginia *compelled* FHA" to lease Commonwealth from IDA. (App. 7a; 562 F.2d at 284; emphasis Judge Wyzanski's.) Turning then to IDA, Judge Wyzanski reasons that, even though IDA is itself a political subdivision of Virginia, the leasing by IDA challenged here cannot constitute state action because "the particular October 28, 1974 ordinance of the Fairfax County Board of Supervisors [cannot be treated] as analogous to a legislative coercive command nor to a legislative regulation of private conduct." (App. 9a; 562 F.2d at 285.) Under *Lafayette*, this analysis is clearly erroneous.

First, by focusing on the identity of the named defendants, Judge Wyzanski loses sight of the challenged activity itself. Stated simply, under the Industrial Development and Revenue Bond Act, the leasing transaction challenged here could not have taken place without the legislative decision of the Fairfax County Board of Supervisors to create IDA with instructions to acquire Commonwealth and lease it to FHA. Thus, it is this decision by the Board of Supervisors which must be deemed the "action complained of," and it is this decision which must be judged under the standard enunciated in *Lafayette. See Mobilfone of Northeastern Pennsylvania, Inc.* v. *Commonwealth Telephone Co.*, 1978-1 CCH Trade Cas. ¶ 61,873 at 73,664 (3d Cir. 1978) ("the current teaching

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standard employed by the District Court is the same as the standard affirmed by this Court in *Lafayette*. Accordingly, no purpose would be served by a remand to the District Court to apply *Lafayette*.

of the Supreme Court is that state officer status *vel non* of the defendants is only a factor in considering the application of *Parker*, not the controlling determination").[9]

Second, Judge Wyzanski further errs in requiring proof that a municipality, such as the County or IDA itself, was *coerced* by the state legislature. Under *Lafayette*, a municipality's actions are deemed those of the state where "the State *authorized* or directed a given municipality to act as it did. . . ." (Slip Op. at 24; emphasis supplied.) As demonstrated, in this case the requisite legislative authorization for the challenged leasing transaction is all-apparent. Indeed, it is difficult to conceive of a more specific or detailed statement of legislative policy and authorization than that set forth in the Industrial Development and Revenue Bond Act.

While expressly disagreeing with Judge Wyzanski's ruling that municipalities may act only at the compulsion of the legislature, Judge Widener would hold that municipal activities must not only be supported by an adequate state mandate, but must also satisfy "one of the analyses set forth in *Cantor*." (App. 16a; 562 F.2d at 288.) Thus, by relying on the test employed in *Cantor*, Judge Widener would evaluate municipal action by much the same standard by which purely private conduct was judged in *Cantor*.

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[9] The essential nature of the challenged activity is further illustrated by the relief requested by plaintiffs, *i.e.*, an injunction prohibiting the leasing transaction. Since IDA is a political subdivision of the state and since its actions were directed by the County which acted under express legislative authorization, it seems clear that IDA, as lessor, is entitled to the *Parker* exemption and could not be enjoined. Yet, the state's policy, as expressed in the Industrial Development and Revenue Bond Act and the Hospital or Health Center Commissions Act, would be just as effectively frustrated if FHA, as lessee, was enjoined. Thus, if the County's decision to lease Commonwealth to FHA was properly authorized by the Virginia legislature, it would make little sense to treat the lessor differently than the lessee.

It is apparent that Judge Widener's reliance on *Cantor* is in conflict with the reasoning of the Fifth Circuit affirmed by this Court in *Lafayette*. As the plurality recognized, the highly restrictive test applied in *Cantor* is not apposite where the "action complained of" is that of a municipality:

> *Cantor's* analysis is not, however, necessarily applicable here. *Cantor* was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement. The situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as an agent of the State. (Slip Op. at 21, n.40.)

Indeed, by requiring that the analysis of *Cantor* be satisfied in this case, Judge Widener imposes a standard more stringent than that recognized as appropriate by any member of this Court.[10]

Petitioners respectfully submit that summary reversal is particularly appropriate in the circumstances presented by this case. In submitting their cross-motions for summary judgment on the state action issue, all parties expressly represented to the District Court that "there are no disputed facts and that the matter is ripe for decision." (District Court Opinion, App. 27a.) In holding

[10] In his concurring opinion, Mr. Chief Justice Burger states that he would require that the State not only compel the anticompetitive activity, but that the activity be essential to a State's regulatory scheme. (Slip Op. at 8-9 n.6.) However, the Chief Justice also makes clear that this test is applicable only where the municipality is operating in a proprietary capacity and not "in the area of traditional government functions." (Slip Op. at 7.) Since the operation of public hospitals and health care facilities has long been a traditional governmental function, it is apparent that Mr. Chief Justice Burger's analysis is not applicable to the leasing challenged here.

for petitioners on this issue, the District Court properly applied the correct legal standard affirmed by this Court in *Lafayette*. The rejection of this legal standard by the Court of Appeals is "so clearly erroneous as to make oral argument a waste of time." R. Stern & E. Gressman, *Supreme Court Practice*, § 5.12 at 220 (1969). In these circumstances, summary reversal is appropriate. *See, e.g.*, *Mason* v. *City of Biloxi*, 385 U.S. 370 (1966); *Johnson* v. *Virginia*, 373 U.S. 61 (1963); *United Rubber, Cork, Linoleum & Plastic Workers* v. *N.L.R.B.*, 362 U.S. 329 (1960); *Rogers* v. *Calumet National Bank of Hammond*, 358 U.S. 331 (1959).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition and in the Reply of Petitioners to Respondents' Memorandum Opposing Certiorari, this Court should summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

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